UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES, WASHINGTON, D.C. OFFICE

FRONTIER COMMUNICATIONS CORPORATION, **Respondent,** **and** **COMMUNICATIONS WORKERS OF AMERICA, DISTRICT 2-13,** **Charging Party.**	**CASE 09-CA-247015**

POST-HEARING BRIEF OF RESPONDENT FRONTIER COMMUNICATIONS

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I. INTRODUCTION

Respondent Frontier Communications Corporation ("Frontier" or the "Company"), through its undersigned counsel, submits this post-hearing brief in support of its contention that the Complaint should be dismissed in its entirety. The Complaint alleged that Frontier violated the National Labor Relations Act ("NLRA" or "Act") in four related respects: (1) on August 1, 2019,[1] the Company refused to furnish Charging Party Communications Workers of America, AFL-CIO, District 2-13 ("Union")[2] with the names of employees for whom the Company had determined it did not possess a complete and correct Form I-9; (2) unreasonably delayed the delivery of that information for seven days, until August 8; (3) on August 8, refused to provide the Union with the deficiencies in the Form I-9 of the employees identified in (1) and the storage location and method of storage of pre-existing From I-9 records for those employees; and (4) failed to notify and bargain with the Union over the "effects" of its July 19 direction to certain employees that they must complete new Forms I-9 and supply related documentation by August 30. Because all of these allegations flow from a single, non-bargainable management obligation – compliance with applicable federal immigration law – Frontier was not obligated to provide the specified information to the Union and it was not obligated to bargain with the Union over the effects (in fact, there were none) of its internal audit to achieve compliance with federal immigration law.

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[1] All dates are 2019 unless otherwise indicated. This case was tried via ZOOM on August 25, 2020, before Administrative Law Judge ("ALJ") Geoffrey Carter.

[2] The Union represents Company employees in the State of West Virginia and in Ashburn, Virginia. For simplicity, Frontier will refer to these employees as the "WV Unit".

II. STATEMENT OF FACTS

A. Frontier's IRCA Compliance Regimen

Frontier is a telecommunications company with about 16,400 employees operating in more than two dozen states in the country. Tr. 174:15-22 (Costagliola). For several years, compliance with federal immigration law had been a corporate goal of the Company. Tr. 176:18-177:21 (Costagliola). Toward that end, Frontier acquired a software package, I-9 Advantage, in or around early 2018. Tr. 179:9-19 (Costagliola).

Beginning on April 1, 2018, Frontier required all newly hired employees to complete a Form I-9 online using that software.[3] *Id.* In late 2018, Frontier began a nationwide Form I-9 compliance audit for its incumbent employees utilizing the software, consistent with its corporate goal. Tr. 176:18-177:21 (Costagliola). Frontier engaged outside immigration counsel, Enrique Gonzalez, to review the audit data for every employee in the Company hired before April 1, 2018 and after November 6, 1986. Tr. 179:9-19, 191:16-20, 195:1-16, 196:24-197:4 (Costagliola).

[3] Since 2015, the Company had been aware of potential issues with its compliance with IRCA's Record Requirement (defined below) in West Virginia. Tr. 176:18-177:21 (Costagliola). While Frontier had attempted to remediate its non-compliance with IRCA's Record Requirement for the WV Unit employees in 2013, that process was botched and correct and complete Form I-9s were not obtained mainly due to invalid acceptance of documents, such a hunting licenses, for purposes of Section 2 of the Form I-9. Tr. 211:25-212:24 (Costagliola). Similar to 2019, in 2013 the Union objected to the Company's efforts to comply with IRCA's Record Requirement, but ultimately the Union abandoned its resistance after the Company voluntarily chose to consult with the Union on the issue in order to streamline obstacles to CBA negotiations while preserving its position that it was not obligated to bargain about this topic under the NLRA. R. Ex. 1; J. Ex. 5; Tr. 184-188 (Costagliola).

The audit was designed to conform with federal immigration law, namely, the Immigration Reform and Control Act of 1986 ("IRCA").[4] This law, *inter alia*, prohibits an employer from hiring and employing an individual knowing that he/she is not authorized with respect to such employment. Tr. 183:3-13; 8 U.S.C. § 1324a(a). An employer determines an individual's authorization to work by verifying his/her identity and employment authorization on the Form I-9. 8 U.S.C. § 1324a(b).

IRCA also requires employers to continuously maintain a correct and complete Form I-9 on file for each employee that they currently employ ("IRCA Record Requirement"). 8 U.S.C. § 1324a(a)-(b); *see also* 8 C.F.R. § 274a.2(b)(2). The failure to comply with this requirement is unlawful – an employer cannot continue to employ an individual for whom it does not have such a form on file – and subjects a non-compliant employer to monetary civil penalties. 8 U.S.C. § 1324a(e); *see also* 8 C.F.R. § 274a.10(b). IRCA compliance is a mandatory, non-delegable duty of all employers in the United States. 8 U.S.C. §§ 1101(b)(3), 1324a(a).

Frontier had completed the audit by mid-June. Tr. 177:25-178:11 (Costagliola). Based on the audit results, Frontier concluded that it was massively non-compliant with the IRCA Record Requirement across its footprint. Tr. 178:1-23, 192:7-13, 195:10-16, 199:14-20 (Costagliola). Frontier either had an incomplete/incorrectly completed Form I-9 or no record of a Form I-9 on file for as many as 15,000 of its employees ("Non-Compliant Employees"). *Id.*

Accordingly, on July 19, Frontier sent all Non-Compliant Employees an e-mail explaining that the IRCA Record Requirement necessitated that they begin the process of

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[4] 8 U.S.C. § 1324a; see also 8 C.F.R. pt. 274a. (Collectively referred to herein as "IRCA" in reference to the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, which established the United States Code section codified at 8 U.S.C. § 1324a.)

completing a Form I-9 promptly. J. Ex. 3. This communication went out to ***all*** Non-Compliant Employees in the Company, including Frontier's Robert J. Costagliola, Senior Vice President - Labor Relations. The process to complete a Form I-9 takes only a couple of minutes, with Step 1 requiring the employee to attest that he or she is eligible for employment in the United States (to be completed by August 8) and Step 2 requiring the employee to present documentation to Frontier supporting the attestation (to be completed by August 30). Tr. 181:24-182:15 (Costagliola); J. Exs. 3, 4; GC Ex. 2.

To date, Frontier's IRCA Compliance Regimen (namely, conducting the audit, determining the universe of Non-Compliant Employees, and then asking them to complete Forms I-9) has been extremely successful, with the vast majority of identified Non-Compliant Employees now being compliant. Tr. 202:4-6 (Costagliola). Notably, the Company achieved compliance voluntarily; not a single employee was disciplined, removed from the payroll or schedule, denied work, or otherwise subjected to any adverse impact upon his or her terms or conditions of employment. Tr. 201:16-202:9 (Costagliola). Indeed, the only consequence to Non-Compliant Employees who have failed to complete a Form I-9 as requested has been that Frontier has continued to send them follow-up requests to do so. *E.g.*, J. Ex. 24 at 2.

B. The Parties' Communications About Frontier's IRCA Compliance Regimen

As discussed above, Frontier sent an e-mail to all its Non-Compliant Employees, including those in the WV Unit, on July 19 requesting that they complete Section 1 of the Form I-9 by August 8 and present documents evidencing authorization to work in the United States in order for Section 2 to be completed by August 30. J. Ex. 3; *see also* J. Ex. 4. This communication spurred a series of e-mails between the parties:

- On July 23, the Union's Administrative Director, Letha "Lee" Perry, e-mailed Frontier's Labor Relations Director Peter Homes, asking some question about the July 19 e-mail and requesting that Homes provide her the list of employees in the WV Unit who received the July 19 e-mail. J. Ex. 5; *see also* J. Ex. 6.[5]
- The next day, on July 24, Homes e-mailed Perry responding to her questions and information request and spoke to her on the phone about the same.[6] J. Ex. 8; *see also* J. Ex. 7. Specifically, Homes responded that all WV Unit employees had received the July 19 e-mail so a seniority list should suffice but that he would get back to her on this.[7] J. Ex. 8.
- On July 29, Perry e-mailed a question to Homes that he had already answered, specifically, asking Homes to confirm that employees who had previously completed a Form I-9 would not be required to complete the Form I-9 called for in the July 19 e-mail. J. Ex. 9.

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[5] Perry here first begins to express her mistaken belief that employees who filled out a Form I-9 in 2013 necessarily could not be Non-Compliant Employees so they in turn could not legally have their employment authorization *re*-verified by being required to fill out another Form I-9 in 2019. J. Ex. 5. As explained elsewhere herein, the Company through its IRCA Compliance Regimen did not *re*-verify *any* employees, which is the Section 3 Form I-9 process for certain individuals who are not U.S. citizens, but rather was solely acting to comply with IRCA's Record Requirement, something that was not satisfied for the WV Unit employees via the botched 2013 process. *See*, *supra*, n.3. Perry also mischaracterizes the 2013 voluntary consultation process as reaching some type of "agreement" which she incorrectly infers is a required process and result that legally must be followed here. J. Ex. 5; *see also* Tr. 188:4-10 (Costagliola).

[6] This was the only time Homes and Perry spoke about these issues.

[7] Homes was mistaken on the scope of WV Unit employees receiving this e-mail. He later corrected this statement since only Non-Complaint Employees received the e-mail. J. Ex. 14.

- Later that day, on July 29, Homes responded stating that he could not confirm that and he was working to confirm the universe of who received the July 19 e-mail (thus beginning the process of correcting his July 24 response to Perry). J. Ex. 10.
- On July 30, Perry again expressed her opinion that if an employee had previously filled out a Form I-9 with Frontier or its predecessor, then that employee should not have received the July 19 e-mail. J. Ex. 11.
- Later that day, on July 30, Homes responded stating, "it's not as simple as whether or not they had previously completed a paper form." J. Ex. 12. He explained that completing a Form I-9 was a simple process mandated by federal law. *Id.*
- The next day, July 31, Perry "object[ed]" to Homes's previous e-mail and specifically contented that Frontier's direction to the Non-Complaint Employees was not required by federal law because it was a ***re-verification*** since WV Unit employees had completed a Form I-9 in the past. J. Ex. 13.
- The next day, August 1, Homes explained to Perry that, "[e]mployees who do not have a correctly completed Form I-9 are required to go through this process." J. Ex. 14. "Not having a correctly completed Form I-9 ranges from not having a Form I-9 at all to having an incomplete or improperly completed Form I-9." *Id.* This e-mail makes clear that the Company's efforts were being undertaken in relation to the federal statutory requirement to continuously maintain correct and complete Form I-9 records on file, based on advice from outside immigration counsel. *Id.*
- Later than day, on August 1, Perry requested that Homes provide her a list of the WV Unit employees who received the July 19 e-mail (since Homes had now clarified that this e-mail was only for Non-Compliant Employees) and she asked for that list to

specify for each employee whether their record was entirely missing or non-compliant due to some other deficiency. J. Ex. 15.

- Later that day, on August 1, Attorney Gonzalez e-mailed Perry and reiterated that Frontier was asking employees to fill out the Form I-9 because it did not have a correct and complete Form I-9 on file for them as federal law requires. J. Ex. 16. Gonzalez, therefore, denied Perry's request given that the relevancy of the information was unclear given that Frontier's actions were dictated by federal law. *Id.*
- On August 5, Perry e-mailed Homes reiterating her information request and "demand[ing] bargaining on the issue of the Company's request for completion of the I-9." J. Ex. 17.[8]
- On August 8, Gonzalez wrote to Perry again explaining that the Company's actions were dictated by federal law. J. Ex. 18. He further explained why the Company could not bargain with the Union given that this was simply an issue of legal compliance, that asking employees to complete this form did not cause any impact upon WV Unit employees, and that therefore the information was not relevant. *Id.* Nevertheless, as a courtesy, Gonzalez provided Perry a list of all the Union-represented WV employees for whom Frontier did not have correctly completed Forms I-9. *Id.*

[8] Note that the contention that a decisional bargaining obligation was at issue in this proceeding was specifically rejected by the ALJ at the Hearing. *See*, *infra*, nn.9-10.

- Later that day, on August 8, Perry again pushed her re-verification theory that Frontier is requiring something above and beyond federal law. She further asks the Company to provide the specific deficiency for each non-compliant WV Unit employee's Form I-9 and the current storage location of the Form I-9 records that the Company determined were deficient. J. Ex. 19. She sent a follow-up on August 15. J. Ex. 20.
- On September 26, Homes informed Perry that he was going to send out a notification to remaining Non-Compliant Employees urging them to fill out the Form I-9. J. Ex. 21. This notice was never sent to WV Unit employees. Tr. 201:2-202:9 (Costagliola).
- On October 2, Perry wrote to Homes again complaining that the Company was seeking to undertake an "***unnecessary re-certification***" of employees' immigration status and reiterated the CWA's request "to bargain regarding the Company's requirement to complete an I-9 above and beyond what is required by federal law." J. Ex. 22 (emphasis added).
- On October 21, Homes sent Perry a "global grievance denial" relating to all pending grievances on the issue of Frontier's IRCA Compliance Regimen, advising her again that these are not bargainable matters and not cognizable disputes under the CBA. J. Ex. 23.
- On October 24, Homes informed Perry that he was going to send out a notification to remaining Non-Compliant Employees urging them to fill out the Form I-9. J. Ex. 28. As with the prior notice, this was never sent to WV Unit employees. Tr. 201:2-202:9 (Costagliola).

- On December 9, Perry asked Homes to explain an e-mail that in fact was sent to a small number of WV Unit employees simply reminding them to please fill out a Form I-9. J. Ex. 24. Unlike the notices sent to Perry but not to the WV Unit employees, this notice did not mention of any potential repercussion for failure to do so. *Id.* Homes explained that fact to Perry. J. Ex. 25. On December 10, Perry repeated the exact concerns she had expressed on August 8 (J. Ex. 19). J. Ex. 26. On December 13, Homes then repeated the exact position the Company had raised before on those topics, e.g., that this is not a bargainable matter. J. Ex. 27.

III. ARGUMENT[9]

Frontier had a non-delegable legal duty to comply with the IRCA, including the IRCA Record Requirement. To comply with that law, the Company had the unilateral right to conduct an internal audit of all the Form I-9 records it had on file. It had the unilateral right to determine whether those records satisfied the IRCA Record Requirement. When it determined that a massive percentage of its employees were non-compliant, Frontier had the unilateral right and legal obligation to become compliant. To achieve compliance, the Company sent all Non-

[9] Notably only an "effects" bargaining obligation (as compared to a decisional bargaining obligation) is at issue in this case. *See*, *infra*, n.10. Furthermore, with regard to that issue, the Complaint solely asks whether Frontier sending the e-mail dated July 19 (Joint Exhibit 3) violated Section 8(a)(5) because Frontier did not bargain about the "effects" of its Form I-9 audit with the Union before sending that e-mail. *See* Compl. ¶ 7. Anything occurring after July 19 is not alleged in the Complaint, was not fully litigated, and cannot form the basis of violation. This includes any correspondence to the Union suggesting that Non-Compliant Employees could receive an e-mail indicating that they could be removed from the schedule if they did not fill out a Form I-9. General Counsel never sought to extend the allegations pertaining to post-July 19 conduct via a Complaint amendment at trial, unlike its failed amendment attempt regarding decisional bargaining, *infra*, n.10, and Respondent specifically argued that the Joint Exhibits were not necessarily relevant to the issues that were in fact alleged in the Complaint. Tr. 14 (Murphy and ALJ).

Compliant Employees, including the non-compliant members of the WV Unit, the same communication on July 19 asking them to complete a new Form I-9 sometime in the next six weeks. When pockets of Non-Compliant Employees (mostly represented by the Union and its sister union in Connecticut) resisted completing a new Form I-9, the Company sent the Union follow-up communications hoping that these would cause the Union to stop directing its members not to complete the Form I-9.

The Complaint alleges, and Counsel for the General Counsel ("CGC") argued, that once Frontier concluded its audit and determined that it did not possess records satisfying the IRCA Record Requirement for the vast majority of its employee, the Company could not remedy its massive IRCA non-compliance unless it first negotiated with the Union about the "effects" that its compliance remedial actions would have on the WV Unit employees' terms and conditions of employment. Compl. ¶ 7. This allegation, the foundation for the other Complaint allegations, Compl. ¶ 6, is without merit.

Upon concluding its audit, Frontier had a legal obligation to comply with the IRCA Record Requirement. Frontier, therefore, had a legal obligation to take necessary steps to achieve compliance – including the entirely reasonable step of asking Non-Compliant Employees to complete a Form I-9. Moreover, Frontier's insistence that Non-Compliant Employees in the WV Unit complete a Form I-9 had no impact upon their terms and conditions of employment, so there were no "effects" to bargain over.

A. Frontier's Action to Comply with IRCA's Record Requirement is Not a Mandatory Subject of Bargaining.

Section 8(a)(5) of the Act requires parties to bargain in good faith, upon request, regarding mandatory subjects of bargaining, which the Act defines as "wages, hours, and other terms and conditions of employment." *Raytheon Network Centric Sys.*, 365 NLRB No. 161, slip

op. at 4 (Dec. 15, 2017). Additionally, the Supreme Court in *NLRB v. Katz*, 369 U.S. 736 (1962), held that Section 8(a)(5) requires employers to refrain from making a change in mandatory bargaining subjects unless the change is preceded by notice to the union and the opportunity for bargaining regarding the planned change. *Raytheon*, 365 NLRB No. 161, slip op. at 4. Therefore, a Section 8(a)(5) violation can only lie if the refusal to bargain relates to a "mandatory" subject of bargaining.

"Mandatory" subjects of bargaining are generally described in Section 8(d) of the Act, which defines the duty to bargain collectively as encompassing "wages, hours, and other terms and conditions of employment." *Id.*, slip op. at 4 n.10. Notably, an employer's compliance with mandates of federal law is not a mandatory bargaining subject. *See, e.g.*, *Exxon Shipping Co.*, 312 NLRB 566, 567-68 (1993) (company lawfully unilaterally adopted a rule related to pay practices as part of action to comply with federal maritime law); *Long Island Day Care Servs., Inc*., 303 NLRB 112, 117 (1991) (unilaterally increasing employee salaries per a federal directive was lawful, employer lacked discretion regarding compliance with directed salary enhancement); *Tri-Produce Co.*, 300 NLRB 974, 984 (1990) (unilateral IRCA compliance lawful because IRCA imposes a "non-negotiable duty" upon employers); *Murphy Oil USA, Inc.*, 286 NLRB 1039, 1039, 1042 (1987) (legally required unilateral changes to work-related conditions were lawful); *Standard Candy Co.*, 147 NLRB 1070, 1073 (1964) (company did not violate the Act by unilaterally adopting wage changes in order to comply with federal law); *S. Transp., Inc.*, 145 NLRB 615, 617-18 (1963) (unilaterally changing wage rates and method of payment to comply with federal law was lawful), *enforced*, 343 F.2d 558 violation.

Here, Frontier's obligation to comply with IRCA was not a mandatory subject of bargaining. Federal law mandates that Frontier maintain for inspection correctly completed

Forms I-9 for each and every one of its current employees, including those in the WV Unit. 8 U.S.C. § 1324a(a)-(b); 8 C.F.R. § 274a.2(b). Federal law mandates that, if the Company does not possess such a compliant Form I-9, it cannot legally continue to employ that employee. 8 U.S.C. § 1324a(a)-(b); 8 C.F.R. § 274a.2(b). Further, the Company is subject to being audited by U.S. Immigration and Customs Enforcement. If it is determined to be out of compliance, it could be subject to civil monetary penalties ranging from $230 to $2,292 per Non-Compliant Employee. 8 C.F.R. § 274a.10(b)(2).

Upon discovering its massive non-compliance, federal law mandated that Frontier obtain correct and complete Forms I-9 as soon as possible from each Non-Compliant Employee, including members of the WV Unit. Federal law mandates both the use of the Form I-9 and the process to complete it, including the identification of the documents that establish employment eligibility. These mandatory obligations required Frontier to direct employees to take the steps needed to fill out a Form I-9, which is all that Frontier has done.[10]

Frontier did not exercise any discretion in its remediation response to the audit to comply with the IRCA Record Requirement. It did nothing more or less than what the law mandated.[11]

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[10] Notably the Complaint alleges that Frontier violated Section 8(a)(5) by advising employees on July 19 that they were required to complete a Form I-9 and supply related documentation by August 30 without first bargaining with the Union over ***the effects*** of Frontier's IRCA Record Requirement compliance audit. Compl. 7. The Administrative Law Judge specifically rejected at the hearing that the Complaint alleged a decisional bargaining obligation, e.g., regarding a failure to bargain over the decision to direct employees to take the necessary steps to complete a Form I-9. Tr. 61-68.

[11] Note that in seeking compliance, Frontier made no optional choice, such as utilizing E-Verify. *cf. Ruprecht Co.*, 366 NLRB No. 179, slip op. at 17-18 (Aug. 27, 2018) (company's unilateral enrollment in the E-Verify system, a voluntary program which is neither statutorily mandated nor required, violated Section 8(a)(5)). In *Ruprecht*, the company unilaterally enrolled in E-Verify, an optional program. Here, Frontier is not using E-Verify; it is merely fulfilling its non-negotiable duty to comply with IRCA.

Contrary to Ms. Perry's assertions in her e-mails to Mr. Homes, Frontier was not seeking to ***re-verify*** any WV Unit employees through its IRCA Compliance Regimen; it was purely seeking compliance with IRCA's Record Requirement.[12] In summary, Frontier was not required to bargain about the effects (assuming there were any) of its decisions to undertake responsive remedial actions to its audit because the actions Non-Compliant Employees were asked to take were part and parcel of its non-bargainable obligation to come into IRCA compliance. Frontier was powerless under the law to take any other actions than what it did, and engaging with the Union would not have changed a thing. Given this, the Complaint, including Paragraph 7(c), should be dismissed.

B. <u>There Has Been No Change to Employees' Terms and Conditions of Employment.</u>

Assuming for argument's sake that Frontier was required to bargain about the effects of its compliance audit, there is still no violation here because Frontier's actions did not change its employees' terms and conditions of employment one iota. As noted, the only thing Frontier did was ask Non-Compliant Employees to spend about a few minutes of work time to complete the Form I-9. This did not change any employment term or condition of the WV Unit and certainly did not change any term in a material, substantial, and significant way. *Caterpillar, Inc.*, 355 NLRB 521, 522 (2010) ("An employer violates Section 8(a)(5) and (1) of the Act if it makes a unilateral change in wages, hours, or other terms and conditions of employment, provided that the change is material, substantial, and significant and that no claim of privilege applies.");

[12] That Frontier sought but failed to successfully obtain correct and complete Forms I-9 in 2013 does not excuse the Company's non-compliance, nor does it negate is obligations to obtain compliant records.

Toledo Blade Co., 343 NLRB 385, (2004) (a unilateral change in mandatory subject of bargaining is unlawful only if it is a material, substantial, and significant change).

At the hearing, the Union admitted that no employee lost time or money and that no one suffered any adverse employment action. Tr. 117:3 (Perry). Indeed, the Complaint itself only finds fault with Frontier ***advising*** employees on July 19 that they needed to complete the Form I-9. Compl. ¶ 7. Simply sending the non-compliant WV Unit employees an e-mail advising them to complete a Form I-9 does not constitute a change to working conditions.

If Frontier had taken adverse action against any Non-Compliant Employee (as it indicated it might in Holmes's e-mails to Perry seeking to cajole compliance), then it would have been obligated to bargain over the effects of any such decision, including the amount of time available to complete a valid Form I-9, and any affected employee would have access to the grievance and arbitration process. That was the holding of the ALJ in *Washington Beef, Inc.*, 328 NLRB 612 (1999). In that case, the employer, upon learning from the federal government that an employee's Form I-9 was not supported by authentic documents, placed that employee on leave and gave him three days to provide authentic documents or face termination. *Id.* at 616-17. Specifically, the ALJ found that the employer had to bargain, ***upon request***, over the amount time given to the employee ***after he had been placed on leave.*** *Id.* at 619-20. Placing the employee on unpaid leave of absence was a non-bargainable managerial decision necessary to comply with IRCA engrained with the employer's determination that it did not have a correct and complete Form I-9 on file for that employee. *Id.* at 619-20. It was only the length of time that the leave needed to last prior to outright termination that was a bargainable topic upon request. *Id.* at 619-20. The ALJ did not find that the decision to place the employee on leave or,

more generally, compliance with federal immigration law, were mandatory subjects of bargaining. *Id.* at 620.

As explained, Frontier never took any adverse action against any member of the WV Unit. If it had administratively removed any employee from the schedule for continued non-compliance, then Frontier would have been obligated to bargain over how much time the removed employee should have to comply with federal immigration law. However, because, Frontier took no adverse action against any WV Unit employee, any discussion of effects bargaining was not required since it would have been both hypothetical and premature. No prospective potential change to terms and conditions of employment was even announced to employees by the Company – i.e., that employee's employment will be terminated – much less effectuated.[13]

In summary, because there has been ***no*** impact upon employment conditions of any WV Unit employee as a result of Frontier's legally required IRCA compliance efforts following its audit, there was no duty to bargain about these hypothetical issues. For this additional reason, the effects bargaining allegation should be dismissed, paragraph 7(c).

C. The Company Did Not Violate the Act as it Relates to the Requests for Information.

Like the refusal to bargain allegation, the unlawful refusal to provide information allegations of the Complaint must also be dismissed. When an employer is not obligated to bargain with a union over an issue, the employer has no obligation under Section 8(a)(5) of the

[13] Note further that conceivably placing employees on leave, a non-bargainable subject here per *Washington Beef*, was not alleged as violative, did not in fact occur, and was never actually announced to employees. Even if it had occurred, this would have been a non-bargainable decision per *Washington Beef* only whereafter the amount of time until termination would have been a bargainable issue and only then upon request.

Act to provide related information. *See, e.g.*, *Goodyear Tire & Rubber Co.*, 312 NLRB 674, 694 (1993) (employer had no obligation to provide requested information relating to matter employer was not obligated to bargain about); *BC Indus., Inc.*, 307 NLRB 1275, 1275 n.2 (1992) (because employer had no statutory obligation to bargain about issue, employer had no duty to furnish information); *Ador Corp.*, 150 NLRB 1658, 1660-61 (1965) (employer was under no obligation to consult with union over the issue, therefore, it did not violate Section 8(a)(5) by withholding information on the issue). Frontier submits that this black letter law should end this inquiry.

The first information request, made on August 1, sought a list of Non-Compliant Employees in the WV Unit. Compl. ¶ 6(a); *see also* J. Ex. 15. Later that day on August 1, the Company advised that it was not going to provide this information because it was related to a non-negotiable legal compliance issue and, thus, it was not clear how the Union was entitled to it. J. Ex. 16. On August 5, the Union reiterated its request and explained why it believed it was owed this information under the NLRA. J. Ex. 17. On August 8, the Company, while preserving its position that it was not obligated to do so, provided the requested information. J. Ex. 18.

The Company's communication on August 1 was not unlawful because the Union's barebones request was not presumptively relevant on its face. J. Ex. 16. Thus, the Company's "denial" of the information request and its request for explanation of its relevance did not violate Section 8(a)(5). *Palace Station Hotel & Casino*, 368 NLRB No. 148, slip op. at 3 (2019) (the duty to provide information does not attach until a request is made for information that is presumptively relevant). Thus, while the Company disputes that this information was ever relevant, it was not made arguably relevant until the Union's August 5 explanation, J. Ex. 17. In response, the Company then provided the information on August 8 (three days later), J. Ex. 18. Notably, the Union did not claim that it was prejudiced in anyway by this minimal delay. *Renal*

Care of Buffalo, Inc., 347 NLRB 1284, 1286 & n.16 (2006) (failure to provide the information until eighteen days after the request is neither a refusal to provide the information nor an unlawful delay in providing it). Accordingly, Complaint paragraph 6(d) and (e) should be dismissed.

The Union's second and third request for information were made on August 8. J. Ex. 19, *see also* Compl. ¶ 6(b). The second asks for the Company to provide the Union with the specific deficiency in each non-compliant WV Unit employee's From I-9 that had been identified in its counsel-aided audit review. The Union candidly admitted that it sought that information in order to challenge – on an employee-by-employee basis – the compliance determinations that the Company's immigration counsel had made. Tr. 23 (Richardson); Tr. 117:4-120:7 (Perry).

As noted above, under applicable law, the employer makes the compliance determination and is solely responsible for legal compliance. These are not shared obligations or ones that an employer can delegate. Indeed, the Company's conducting its audit is not alleged to be an unlawful unilateral action in the Complaint. Therefore, because this element and indeed no aspect of Frontier's Compliance Regimen required bargaining, *a fortiori*, none of the information sought by the Union to reverse or challenge the audit results must be provided. This portion of Complaint paragraph 6(f) should be dismissed.

Finally, the Union's third request, seeking information regarding the storage location and method of storage of the "old" Forms I-9 is a "red herring" and did not trigger an obligation on the part of Frontier to provide that information. The underlying issue (how the Company stores its "old" documents) is not a term or condition of employment. Therefore, Frontier had no obligation to bargain over it and, derivatively, no obligation to provide related information. *See ABM I Bus. & Indus.*, NLRB Case No. 13-CA-259139, slip op. a 1; 2020 WL 4924273, at *2

(Advice Response Memo dated July 9, 2020) (NLRB General Counsel ordering dismissal of a similar allegation because "the company's document retention policy [is] … not … relevant because it d[oes] not relate to employees' terms and conditions."). This remaining portion of Complaint paragraph 6(f) should be dismissed.

IV. CONCLUSION

For all of the foregoing reasons, the Administrative Law Judge should find that all of the Complaint's allegations lack merit. Frontier did nothing but what it was legally required to do – seek to comply with IRCA's mandates. As it is not required to bargain about its IRCA Compliance Regimen, the Company has no legal obligation to provide information in response to the Union's requests at issue. Further, as the IRCA Compliance Regimen had no measurable impact on the WV Unit employees' employment terms, Frontier had no obligation to bargain over the non-existent "effects" of that compliance. Accordingly, the Complaint should be dismissed in its entirety.

* * *

Dated: September 29, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2020, I caused a copy of the foregoing Post-Hearing Brief of Respondent Frontier Communications in NLRB Case No. 09-CA-247015 to be delivered to the following individuals:

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The same document was then e-filed the same day with the National Labor Relations Board, Division of Judges, Washington, D.C. Office.

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